Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

PAUL LEROY ERVIN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition For A Writ Of Certiorari To The Superior Court Of The Commonwealth Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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5/01

QUESTION PRESENTED

Whether trial counsel's performance was in violation of the Sixth Amendment, for failure to object, when in its case in chief, the prosecution produced two police officers who each revealed petitioner's pre-arrest silence after he was confronted with criminal allegations made against him, and when in closing, the prosecutor critically cited petitioner's silence, thus allowing substantive evidence of petitioner's compelled silence to be used against him.

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In the Supreme Court of the United States

No.

PAUL LEROY ERVIN, PETITIONER

v.

COMMONWEALTH OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

Paul Leroy Ervin petitions for a writ of certiorari to review the judgment of the Superior Court Pennsylvania in this case.

OPINION BELOW

The opinion of the Superior Court (App., *infra*, 1a-13a) is reported at 766 A.2d 859 (Pa. Super. 2000).

JURISDICTION

The judgment of the Superior Court was entered on December 29, 2000. (App., *infra*, 13a). The Supreme Court of Pennsylvania denied a timely filed petition for allowance of appeal on January 4, 2002 (App., *infra,14a).* The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to. . . have the Assistance of Counsel for his defense."

STATEMENT

Following a jury trial, petitioner was convicted in the Court of Common Pleas of Bucks County, Pennsylvania on a variety of counts ranging from rape to indecent exposure, related to the sexual molestation of his then 10-year-old and 11-year-old daughters.[1] App., *infra*., 1a-2a. Petitioner was sentenced to an aggregate term of 7½ to 15 years imprisonment. Ibid.

After the exhaustion of his direct appeals, *Commonwealth v. Ervin,* 691 A.2d 966 (Pa. Super. 1997) and *Commonwealth v. Ervin,* 700 A.2d 438 (1997), petitioner timely pursued collateral relief which resulted in a reported decision by the Superior Court of Pennsylvania, App., *infra*, 1a-13a, and the subsequent denial of a petition for allowance of appeal by the Supreme Court of Pennsylvania which was entered on January 4, 2002. *Id.* at 14a.

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1 "We need not repeat the sordid background facts of this case. . . . See *Commonwealth v. Ervin*, 691 A.2d 966, 968-969 (Pa. Super. 1997)." App., *infra*, 2a). Petitioner does not quarrel with the Superior Court's characterization but wonders how it may bear on the question whether petitioner received effective assistance of counsel.

The Superior Court decision is the subject of the within Petition for Writ of Certiorari.

1. At petitioner's trial, during the prosecution's case in chief, on examination of each of two police officers about the night they went to petitioner's home to remove his two daughters pursuant to their mother's complaint that petitioner had sexually molested them, after his being told of the allegations, each officer related "[s]everal times . . . that Ervin [Petitioner] did not question them or say anything while they removed his children." App., *infra,* 4a (emphasis supplied).

Trial counsel neither objected nor sought a curative instruction or any other for relief after the decidedly objectionable and prejudicial testimony of each police officer. App., *infra*, 4a.

Further, in closing argument, the prosecutor criticized petitioner's pre-arrest silence as follows:

> "Finally, you have heard from the two police officers. On the night that the police came in--nothing, [noting], odor of alcohol, he was under the influence maybe, nothing else. If somebody comes into your home at two a.m. or one a.m. in the morning, takes your three children . . . . The outrage, the outrage that you should have, the questions that you should have. You have done nothing wrong, why are you taking my children? I have done nothing wrong."

App., *infra,* 5a (footnote omitted; emphasis supplied).

Again trial counsel failed to act either to seek a motion *in limine* in advance of the closing or some other remedy for such predictably objectional and prejudicial remarks. Hence, what was foreseeable to come in at closing -- compelling criticism of silence in the face of criminal allegations, calculated to urge an undisputed inference of guilt -- was heard by the jury for consideration in its deliberations.

2. It is thus not surprising that the Superior Court found, "[g]iven the potential prejudicial impact of such evidence and argument, we agree that Ervin's claim of ineffectiveness has arguable merit." App., *infra,*5a.

In spite of this finding, the Superior Court proceeded to absolve trial counsel from a further finding of ineffectiveness by concluding, petitioner contends erroneously, (1) that at the time of petitioner's trial " the state of the law was unclear,"App., *infra*, 6a, and, again petitioner contends erroneously, (2) that there is an insufficient showing of prejudice to demonstrate that the outcome of petitioner's trial might have been different, if the cited references to his pre-arrest silence had been excluded from the jury's consideration. App., *infra*, 7a.

REASONS FOR GRANTING THE PETITION

The Superior Court has held that a criminal defendant is not protected by the Sixth Amendment, even where it has found that a "claim of ineffectiveness has arguable merit," based on "potential prejudicial impact," first because, at the post-conviction hearing, then-counsel did not question trial counsel as to why he failed to object to the prosecutor's questioning and argument. The court claimed that it thus had no way to determine whether trial counsel may have had a reasonable basis for not objecting. The

court dismissed the view that the record itself reveals that there could be no such basis. App., *infra,* 5a.

Additionally, the court proceeds to trump its finding of "arguable merit" by providing a second reason for not concluding that trial counsel was ineffective. Reasoning that because at the time of petitioner's trial "the state of the law was unclear," the court finds it could not conclude that "counsel lacked any reasonable basis for failing to object." App., *infra*, 5a - 6a.

And finally, the court found that the admission of the evidence and argument complained of was not sufficiently prejudicial. The court reasoned, "in the context of the trial as a whole -- the forceful testimony of the two girls, together with the medical expert testimony about the probable causes of the deformation of A.T.'s hymen" -- that petitioner would have been convicted without the evidence and argument. App., *infra*, 7a.

The Superior Court's holding, if left in place, would effectuate a radical change in the standards for ineffectiveness which have been established and maintained by this Court and would produce a variety of adverse consequences in the trial of criminal cases in the Commonwealth of Pennsylvania. Nothing in this court's jurisprudence justifies the Superior Court's holding.

If allowed to stand, the Superior Court's decision would impose serious costs on the criminal justice system. It hampers the expeditious resolution of criminal trials; it may erroneously influence the conduct of ongoing investigations; it encourages prosecutorial overreaching at trial; and it intrudes on the strong interest in the finality of criminal verdicts.

The criminal justice system has a pressing need for this Court's resolution of the question presented. Because a vast number of criminal cases in both the State and Federal courts are resolved by trial, the question has recurring national importance. Guidance from this Court is especially needed because in general, if allowed, it is to be expected that the practice of prosecutors will be to seek the introduction of evidence of an accused's pre-arrest silence and to comment on it in closing argument. This Court's intervention is therefore warranted.

A. The Superior Court's Opinion Conflicts With This Court's Decisions

1. The Superior Court's holding is "contrary to" and involves "an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. §2254(d)(1) (1994 ed., Supp. III).

The merits of petitioner's claim are squarely governed by *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. To establish ineffective assistance of counsel, it must be shown: (1) that trial counsel's performance fell below an objective standard of reasonableness, 466 U.S. at 688, and (2) that the deficient performance prejudiced the defense, showing a reasonable probability that, but for the deficient performance, the verdict would have been different. *Id.* at 694.

Because *Strickland* was clearly established federal law as determined by this Court at the time of petitioner's trial, it dictates that the Superior Court was bound to reasonably apply the *Strickland* test in entertaining petitioner's ineffective assistance claim. See Teague v. Lane, 489 U.S. 288, 301 (1989).

Although the Superior Court applied a three-pronged test stated in *Commonwealth v. Wallace,* 724 A.2d 916, 921 (1996), for present purposes, it is assumed that the test stated encompasses the *Strickland* standard and thus complies with one requirement of 28 U.S.C. §2254 (d)(1).

The question presented here arises from the "unreasonable application" of the *Strickland* standard which in turn makes the Superior Court's holding "contrary to" clearly established federal law as determined by this Court.

2. The Superior Court made an erroneous attempt to justify it's conclusion that petitioner received effective assistance of counsel by incorrectly applying the law.

a. Instead of applying the *Strickland* standard, the court attempted to justify trial counsel's repeated failure to object by linking those failures to the observation that at the time of petitioner's trial, "the state of the law was unclear." [2] App., *infra*, 6a.

The clarity of Pennsylvania law at that time is entirely beside the point. Rather, it is indisputable that evidence of silence in the face of criminal allegations, at any time, will be perceived

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[2] The multiple failures are thus magnified, given that, after the first officer testified, counsel should have been forewarned that the prosecutor would predictably pursue the same line of questioning with the second officer. It is obvious that at a time before the second officer testified, there were several opportunities to seek a ruling from the trial judge to prevent the recurrence of such testimony. "Several times the officers commented that Ervin did not question them or say anything while they removed his children." App., *infra*, 4a (emphasis supplied).

by a jury as a tacit admission or evidence of guilt. "We would be naive if we failed to recognize that most laymen view an assertion of the Fifth Amendment privilege as a badge of guilt." *Walker v. United States*, 404 F.2d 900, 903 (5th Cir. 1968). Further, "[t]he privilege against self-incrimination would be reduced to hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." *Slochower v. Board of Higher Ed. of N.Y.*, 350 U.S. 551, 557 (1956).[3]

b. Furthermore, trial tactics or strategy as a matter of reasonable performance could not justify the omissions. See, *United States v. Cronic*, 466 U.S. 648 (1984); *Cf. Williams v. Taylor*, 529 U.S. 362, 373 (2000).

It has long been the law in Pennsylvania that "[t]estimonial reference to an accused's silence. . .at the time of arrest is a constitutionally impermissible violation of the accused's Fifth Amendment right." *Commonwealth v. Haideman*, 449 Pa. 367,

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"The maxim *nemo tentur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which. . .[were] not uncommon in England. . . . The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Miranda v. Arizona*, 384 U.S. 436, 442-443 (1966), citing *Brown v. Walker*, 161 U.S. 591, 596-597 (1896).

370 (1972). Moreover, this Court has long held that neither the prosecutor nor the court may invite or allow the jury to infer guilt from an accused's failure to testify at trial. *Griffin v. California*, 380 U.S. 609 (1965).

While *Griffin* involved substantive use of a defendant's silence at trial, rather than when initially confronted by the police, that distinction should not make a difference in counsel's duty to object. The prejudice is clearly the same in both instances. "In this respect we believe *Griffin* remains unimpaired and applies equally to a defendant's silence before trial, and indeed, even before arrest." *Savory v. Lane*, 832 F.2d 1011, 1018 (7th Cir. 1987).

In sum, the Superior Court's opinion suggests that while substantive use of a defendant's silence at the time of or after arrest is objectionable and constitutionally prohibited (see *Haideman, supra*), when applied to pre-arrest silence, assuming the law is "unclear," it becomes allowable not to object. Nothing could be more untrue. Counsel should have and could have objected on grounds other than the Fifth Amendment namely, relevance and prejudice outweighing probative value. The failure of counsel to object is inexcusable.

The court's statement that it could not conclude that trial counsel lacked any reasonable basis for failing to object is untenable. App., *infra*, 6a. In a case similar to that presented here the Sixth Circuit Court of Appeals found:

> "Defense counsel's failure to object to the unconstitutional use of Combs's 'talk to my lawyer statement' clearly fell below an objective standard of reasonableness. Although the contours of the privilege against self-incrimination may sometimes be

> unclear, that a defendant's silence cannot be used as substantive evidence against him at trial is a fundamental aspect of the privilege. Combs's counsel should have realized that the use of Combs's pre-arrest silence against him was at least constitutionally suspect and should have lodged an objection on that basis. Counsel's failure to have objected at any point is inexplicable, and we can perceive no possible strategic reason for such failure. Not only did the failure to object ensure that the jury could use Comb's protected silence against him, but it also guaranteed that both the admission of the statement and the trial court's instruction would be analyzed on review only for plain error. Counsel's performance with respect to this issue was constitutionally deficient under the *Strickland* standard."

Combs v. Coyle, 205 F.3d 269, 286 (6th Cir. 2000) (emphasis supplied; footnotes omitted).

3. The Superior Court's decision is equally flawed for its conclusion that the failures complained of were not sufficiently prejudicial.

Using a standard set forth in *Commonwealth v. Kimball*, 724 A.2d 326, 331 (1999) (noting that to show prejudice, defendant must show "reasonable probability" that the outcome of the trial would have been different), the Superior Court concluded that petitioner was not so prejudiced. App., *infra*, 7a.

The court concluded, due to the "forceful testimony of the two girls, together with the medical expert testimony about the probable causes of the deformation of A.T.'s hymen -- that Ervin

would have been convicted without this evidence and argument." App., *infra*, 7a.

Petitioner contends, however, that the standard by which to measure ineffectiveness is whether the failure "had a substantial and injurious effect or influence in determining the jury's verdict." See *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

a. As for the "forceful" testimony of the two girls, it should be noted, first, that the Superior Court also found the factual background here to be "sordid." App., *infra*, 2a.

Accordingly, it is obvious that the court forged a strong adverse link to the "background facts" of this case. A visceral reaction to the facts should not be allowed as a substitute for the need to reason to a conclusion. The court's label presents a rare occasion to illustrate the validity of the now unpopular view that sexual assault is a "peculiar" offense requiring exceptional rules to ensure just convictions. See Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom,* 77 Colum. L. Rev. 1, 7-10 (1977). Hence, in several jurisdictions, complainants and younger victims especially, had been long held to be subjects of additional scrutiny in their testimony. See, e.g., *Carmel v. Texas,* 529 U.S. 513 (2000). Courts and legislatures had been concerned with such factors as age, jury outrage, the difficulty of defending against such charges, the dangers of fabrication and the severe penalties prescribed. "When a charge of this sort is made, the people, and the jurors likewise, are apt to let their indignation get the better of their judgment, and convict upon evidence which

does not authorize it." *Davis v. State,* 120 Ga. 433, 435 (1904).[4]

The word "sordid" is nowhere to be found in the opinion of that panel of the Superior Court that decided petitioner's direct appeal. See *Commonwealth v. Ervin*, 691 A.2d 966, 968-969 (Pa. Super. 1997). Neither is there found the word "forceful" to describe the testimony of the two girls. Such an assessment is properly made only by a trial judge who has had the opportunity to view the witness directly.

In such circumstances, the Superior Court's conclusion that the testimony of the two minor witnesses was "forceful" is untenable, inherently suspect and it should not be allowed to stand alone as otherwise sufficient evidence of petitioner's guilt. As Lord Chief Justice Hale observed, rape is " an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, tho never so innocent." 1M. Hale, *The History of the Pleas of the Crown 635* (1680). The Superior Court failed in its role as an appellate court -- a court required to determine whether the jury's conviction is supported by substantial evidence.

b. As for the second factor cited by the court as sufficient to overcome prejudice--the medical testimony as corroborative of the testimony of the two girls -- the court's conclusion again is fatally flawed.

4
Although we do not dispute the trend in recent years to repeal and repudiate statutory and court created corroboration requirements in cases of sexual assault, the Superior Court's opinion in this case itself should fall victim to the policy considerations supporting such a requirement.

It is factually in error and in conflict with the record to state, as the court did, that the medical testimony supports a conclusion that penetration by sexual assault is the "probable cause[s] of the deformation of A.T.'s hymen." App., *infra,* 7a.

An examination of the entire testimony, both direct and cross examination, reveals that the witness was equivocal about the cause of what he described as penetration.

On direct examination the doctor's testimony was:

> "Q. Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether these findings are consistent with penetration of an adult male penis in Amanda's vagina?
> A. They are consistent with a penetration of her vagina and/or orifice or the anus."

Commonwealth v. Ervin, Pa. Super., Cr. No. 02890EDA99, reproduced record, vol. one at 171.

On cross examination the doctor testified as follows:

> "Q. It's true, Doctor, that while this fissure that you found, physical evidence of trauma that you found, is consistent with an alleged penetration, it's also consistent with some other trauma; isn't that true?

A. It could have been caused by some other trauma.
Q. It could have been caused by some other trauma?
A. It could have.
Q. Now, Doctor, you indicated that you could not see a break in the hymen?
A. I couldn't see one like I could see the fissure.
Q. I mean you could actually look at the fissure and see there was a tear or opening of some sort?
A. At the fissure, right.
Q. And you could not do that in the area of the hymen?
A. The hymen, to me, looked a little bit abnormally shaped.
Q. Okay. There are other causes for that, other than penetration by an adult male penis?
A. Yes."

Commonwealth v. Ervin, Id at 173-174.

The testimony of the doctor is therefore equivocal or neutral. Indeed, the panel of the Superior Court which decided petitioner's direct appeal cited with approval the trial court's assessment of the doctor's testimony, as follows:

"At trial, the Commonwealth presented testimony from Dr. David G. Marx. Dr. Marx was the emergency room physician who examined A.T.... During cross-examination by [trial counsel], Dr. Marx conceded that although he believed a fissure existed

> in the vaginal area of A.T., and that her hymen was 'abnormally shaped,' photographs of the area did not show such injuries.
>
> Further expert medical testimony was not proffered by [trial counsel] as he believed Dr. Marx's testimony to be largely 'neutral.' Because the photographs of A.T.'s vaginal area were inconclusive and Dr. Marx's 'testimony allowed the jury to conclude that the injury to [A.T.] was consistent with some other trauma,' additional testimony was deemed unnecessary."

Commonwealth v. Ervin, 691 A.2d 966, 971 (Pa. Super. (1997).

Accordingly, the panel of the court that authored the opinion now before this Court is seriously in error for stating that "the medical expert testimony about the probable causes of the deformation of A.T.'s hymen -- [demonstrates] that Ervin would have been convicted without this evidence and argument." App., *infra,* 7a (emphasis supplied).

In sum, the court's conclusion that the failures of trial counsel did not result in prejudice to petitioner is in error.

B. The Superior Court's Ruling Imposes Serious Costs on the Criminal Justice System and Causes Unfairness and Unreliability at Trial.

The trial of a criminal case is perhaps the most hallowed component of the administration of justice.

The Superior Court's ruling significantly hampers the expeditious resolution of criminal trials It intrudes also upon the

interests of fairness and finality. It enables a defendant to attack a verdict of guilty, most usually, only after a direct appeal by collateral attack. The essence of such a claim is not necessarily that the verdict is incorrect, but that fairness was denied, which is just as much a fundamental flaw.

As this Court has recognized, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States v. Timmreck,* 441 U.S. 780, 784 (1979). An intrusion on finality is especially costly to the system when there is no claim that "unfair procedures may have resulted in the conviction of an innocent defendant." *Ibid* at 784.

In sum, the court's ruling seriously impairs the fairness and reliability of the criminal trial process.

C. There Is A Sharp Conflict In The Circuit Courts of Appeals Resulting In Disparate Treatment Of Like Questions Which Have Recurring National Importance

Though petitioner does not advance the question presented as requiring a violation of the Fifth Amendment privilege against self incrimination, this case does present an opportunity for this Court to address a frequently recurring question of importance on which the courts of appeals are in sharp conflict. The resolution of the question presented, if addressed with a Fifth Amendment component, will fundamentally affect the trial of criminal cases in all jurisdictions.

This Court has not yet ruled on whether pre-arrest silence

as substantive evidence is protected by the Fifth Amendment. See *Jenkins v. Anderson,* 447 U.S. 231, 236 n 2 (reserving issue) (1980). Within a year of when *Jenkins* was decided, Judge Friendly had occasion to observe:

> "[W]e have found no decision permitting the use of silence, even the silence of a suspect who has been given no Miranda warnings and is entitled to none, as part of the Government's direct case. While *Jenkins* may require a reexamination of lower court decisions extending *United States v. Hale* [collected citations] to the silence of a suspect who has been taken into custody but has not received Miranda warnings, we are not confident that Jenkins permits even evidence that a suspect remained silent before he was arrested or taken into custody to be used in the Government's case in chief. We will thus assume, without deciding, that even if we were to hold that Gonzalez was not in custody during the ripping apart of his suitcase, this would not necessarily carry the day for the prosecution in light of the fact that all of the cases permitting proof of silence, including *Jenkins*, have involved impeachment or rebuttal of the defendant's testimony."

United States v. Caro, 637 F.2d 869, 876 (citations omitted) (2d Cir. 1981).

In little more than twenty years since Judge Friendly's comment, the judicial landscape has changed remarkably. There are now several decisions demonstrating a sharp conflict in how the contours of the Fifth Amendment privilege are applied to pre-arrest silence. See *Ouska v. Cahill-Masching,* 246 F.3d 1036 (7th Cir. 2001) (explaining the circuit split); *Combs v. Coyle,* 205 F.3d

269, 282-283 (6th Cir. 2000), *cert. denied*, *Bagley v. Combs*, 531 U.S. 1035 (2000).

Resolution of the conflict in authority by this Court is necessary to establish uniformity in the application of the Fifth Amendment right for an accused "not to be compelled in any criminal case to be a witness against himself" and to avoid the present treatment of similarly situated defendants based solely upon the circumstance of geographic location.

In *Griffin v. California*, 380 U.S.609, 615 (1965), this court held that "the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."

Petitioner has found no case decided by this Court holding or suggesting that the pre-arrest silence of a suspect can be use by a prosecutor either in his direct case or in closing argument.

Further, it has been held by this Court that the Fifth Amendment must be accorded a liberal construction, favoring the right it was intended to secure. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

Permitting proof of pre-arrest silence in the prosecution's case in chief and allowing closing argument about it substantially impairs the policies behind the privilege. See *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964).

If in the case of substantive use, an accused cannot avoid

the introduction of his pre-arrest silence by refusing to testify at his trial, any subject will be under compulsion to speak either upon confrontation with the police or at his trial in order to explain his silence. Absent such explanation, he inevitably suffers the consequence of the undeniably compelling inference of guilt that comes merely from remaining silent in the face of criminal accusation. Such a dilemma substantially undermines the fairness otherwise accorded those who are either criminally suspect or actually accused.

Additionally, quite unlike the case of impeachment use against a testifying defendant, the use of a non-testifying defendant's pre-arrest silence as substantive evidence of guilt lessens the prosecutor's burden of proving guilt by evidence independent of the fatal inference drawn from such silence.

Such a use of silence is not a legitimate prosecutorial practice. It impairs the reliability of the criminal process. Just as "every post arrest silence is insolubly ambiguous," *Doyle v. Ohio*, 426 U.S. 610, 617 (1976), the same must be said for pre-arrest silence.

In sum, allowing substantive use of pre-arrest silence defeats the meaning and purpose of the policies underlying the privilege while adding nothing to the reliability of the outcome of criminal trials.

Review by this Court is warranted to decide whether the Constitution allows or prohibits such a repugnant use of silence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted:

Nicholas J. Nastasi
Counsel for Petitioner

April 1, 2002

APPENDIX A

2000 PA Super 409

COMMONWEALTH OF PENNSYLVANIA, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	No. 2890 EDA 1999
PAUL LEROY ERVIN, Appellant	:	

Appeal from the PCRA Order of August 31, 1999
In the Court of Common Pleas, Criminal Division
Bucks County, Nos. 4981-95 & 4982-95

(Filed Dec. 29, 2000)

BEFORE: POPOVICH, TODD, JJ. and CIRILLO, P.J.E.*

OPINION BY TODD, J.:

¶1 Paul Leroy Ervin appeals the order of the Bucks County Court of Common Pleas denying his request for relief under the Post Conviction Relief Act ("PCRA").[1] We affirm.

¶2 On December 13, 1995, following a jury trial on charges related to Ervin's molestation of his then 10-year-old daughter, A.T., and then 11-year-old daughter, M.T. – both of whom testified against their father – Ervin was

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* This Opinion originally was issued as an unpublished Memorandum in which President Judge Emeritus Cirillo joined. Subsequently, we granted Appellant's motion to publish, Judge Cirillo died before this Opinion was issued.

[1] 42 Pa.C.S.A. §§ 9541-9546.

convicted of there counts of rape,[2] four counts of involuntary deviate sexual intercourse,[3] five counts of aggravated indecent assault,[4] nine counts of indecent assault,[5] two counts of endangering welfare of children,[6] and one count each of incest,[7] indecent exposure,[8] statutory sexual assault,[9] and sexual assault,[10] on two consolidated informations. He was sentenced to an aggregate term of 7 to 15 years imprisonment.

¶3 We need not repeat the sordid background facts of this case as they were recounted by this Court in Ervin's direct appeal. *See Commonwealth v. Ervin,* 691 A.2d 966, 968-969 (Pa. Super. 1997). In that appeal, Ervin's judgment of sentence was affirmed and, on September 3, 1997, his petition for allowance of appeal was denied by our Supreme Court. *See Commonwealth v. Ervin,* 549 Pa. 696, 700 A.2d 438 (1997). Ervin then filed a timely PCRA petition, predominately asserting ineffective assistance of trial and appellate counsel, and seeking a new trial. After a hearing on March 19, 1999, the PCRA court issued an order denying relief and Ervin filed this timely appeal.

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[2] 18 Pa.C.S.A. § 3121.

[3] 18 Pa.C.S.A. § 3123.

[4] 18 Pa.C.S.A. § 3125.

[5] 18 Pa.C.S.A. § 3126.

[6] 18 Pa.C.S.A. § 4304.

[7] 18 Pa.C.S.A. § 4302.

[8] 18 Pa.C.S.A. § 3127.

[9] 18 Pa.C.S.A. § 3122.1

[10] 18 Pa.C.S.A. § 3124.1.

¶4 On appeal, Ervin asserts the following issues for review:

> (1) Whether prior counsel were ineffective for failing to object and raise on direct appeal, on constitutional and evidentiary grounds, the prosecutor's introduction of the non-testifying defendant's silence while in the presence of the police as substantive evidence of guilt and the prosecutor's exploitation of that silence when he argued to the jury that if the defendant had done nothing wrong he would have protested his innocence rather than remain silent?
>
> (2) Whether prior counsel were ineffective for not objecting or raising on appeal, improper, pejorative, and prejudicial references in the prosecutor's closing argument, when he accused the defense attorney and defense witnesses of engaging in a cover-up, expressed his personal opinion on credibility, used the defendant's silence as evidence of guilt, and urged the jury to reward the courage of the defendant's daughters with a guilty verdict.
>
> (3) Whether trial counsel was ineffective for not calling character witnesses at trial and whether post[-]trial counsel was ineffective in his handling of this claim on appeal when the failure to call the witnesses at trial was based on trial counsel's erroneous belief that character witnesses could be cross-examined about a prior arrest even though that charge had been dismissed?

(Brief for Appellant, at 8.)

¶5 To prevail on a claim of ineffectiveness of counsel, an appellant "must demonstrate (1) that the underlying claim is of arguable merit; (2) that counsel's course of conduct was without a reasonable basis designed to effectuate his client's interest; and (3) that he was prejudiced by counsel's ineffectiveness." ***Commonwealth v. Wallace,*** 555 Pa. 397, 407, 724 A.2d 916, 921 (1996). It is the appellant's burden to prove all three prongs of this standard. ***See Commonwealth v. Travaglia,*** 541 Pa. 108, 118, 661 A.2d 352, 357 (1995). To sustain a claim of ineffectiveness, counsel's approach must be "so unreasonable that no competent lawyer would have chosen it." ***Commonwealth v. Miller,*** 494 Pa. 229, 233, 431 A.2d 233, 234 (1981).

¶6 Ervin's first issue concerns whether prior counsel were ineffective for failing to object to, and raise on direct appeal,[11] the prosecutor's introduction of evidence of Erwin's pre-arrest silence and the prosecutor's commentary on the same during closing argument, given that Ervin did not testify at trial. On direct examination, the prosecutor questioned two officers regarding the night they came to Ervin's house, not to arrest him, but to remove his two children in response to their mother's report of molestation. Several times the officers commented that Ervin did not question them or say anything while they removed his children. (N.T. Trial, 12/12/95, at 164, 167, 185.) Further, in his closing arguments, the prosecutor made the following comments:

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[11] If trial counsel were ineffective, then appellate counsel was necessarily ineffective for failing to bring that claim.

> Finally, you have heard from the two police officers. On the night that the police came in – nothing, [noting], odor of alcohol, he was under the influence maybe, nothing else. If somebody comes into your home at two a.m. or one a.m. in the morning, takes your three children, you stand there and say, "See you, wouldn't want to be you"? The outrage, the outrage that you should have, the questions that you should have. You have done nothing wrong, why are you taking my children? I have done nothing wrong.

(N.T. Trial, 12/13/95, at 40.)[12]

¶7 Given the potential prejudicial impact of such evidence and argument, we agree that Ervin's claim of ineffectiveness has arguable merit. At the PCRA hearing, however, Ervin did not question trial counsel concerning why he failed to object to the prosecutor's questioning and argument; therefore, we have no way of determining whether trial counsel may have had a reasonable basis for not objecting. It is the defendant's burden to establish each element of the ineffectiveness standard and we will not speculate as to counsel's rationale. *See Travaglia,* 541 Pa. at 118, 661 A.2d at 357. Ervin does not dispute that there was no testimony at the PCRA hearing regarding trial counsel's basis for failing to object. (Brief for Appellant, at 32.) Rather, he asserts that a review of the record nonetheless reveals that there was no such basis. (*Id.*) We disagree.

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[12] The attribution of the quote "See you, wouldn't want to be you" to Ervin by the prosecutor is puzzling as the record shows that Ervin said nothing to the police officers.

¶8 The Superior Court recently held that "a defendant's pre-arrest silence may not be admitted into evidence when the defendant does not testify at his own trial." *Commonwealth v. DiNicola,* 751 A.2d 197, 201 (Pa. Super. 2000). However, before this decision and thus at the time of Ervin's trial, the state of the law was unclear. Indeed, in *DiNicola,* this Court, in reviewing the case law concerning the constitutional ramifications of references to a defendant's pre-arrest silence, commented: "Because the Pennsylvania courts have not addressed the issue of the admissibility of pre-arrest silence when the defendant does not testify at his own trial, we turn to other jurisdictions for guidance." *Id.* at 201.

¶9 Therefore, this is not a case such as *Commonwealth v. Clark,* 533 Pa. 579, 586, 626 A.2d 154, 157 (1993) – cited by Ervin – where the Supreme Court concluded without testimony of counsel that the state of the law was so clear, and the prejudice so obvious, that counsel could not have had a reasonable basis for failing to object. We cannot, on this record, conclude that counsel lacked any reasonable basis for failing to object.[13]

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[13] We also reject Ervin's contention that he was in police custody when they came to remove his children, a conclusion which would raise the constitutional import of references to his silence at trial. *See Commonwealth v. Drass,* 718 A.2d 816, 821 (Pa. Super. 1998) ("It is well settled that a clear violation of the accused's constitutional right against self-incrimination results from references to accused's silence while in police custody.") The record shows that the police stated that their sole reason for being at his house was to remove the children. Ervin was not detained by the police; he was not questioned; he was only told to go downstairs and wait so that he could not interfere while they removed the children. In short, we find nothing in the

¶10 In addition, we agree with the PCRA court that Ervin has failed to show that he was prejudiced by the introduction of this evidence and argument, that the outcome of the trial would have been different without the references to his pre-arrest silence. ***See Commonwealth v. Kimball,*** 555 Pa. 299, 309, 724 A.2d 326, 331 (1999) (noting that to show prejudice, defendant must show "reasonable probability" that the outcome of the trial would have been different). We are convinced that in the context of trial as a whole – the forceful testimony of the two girls, together with the medical expert testimony about the probable causes of the deformation of A.T.'s hymen – that Ervin would have been convicted without this evidence and argument. Therefore, because we conclude Ervin has failed to show counsel lacked a reasonable basis for his actions and because he was not prejudiced, we reject this claim of ineffectiveness.[14]

¶11 Ervin next contends that prior counsel were ineffective for not objecting to, or pursuing on direct appeal,

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record to suggest that Ervin was in custody or subjected to custodial interrogation. ***See Commonwealth v. Zogby,*** 689 A.2d 280, 282 (Pa. Super. 1997) ("A person is deemed in custodial interrogation if he is placed in a situation in which he reasonably believes that his freedom of action is restricted by the interrogation.").

[14] Ervin also argues that counsel should have objected to the prosecutor's questions on evidentiary grounds, that Ervin's silence in the presence of the officers did not constitute a "tacit admission" and thus was not admissible as such. We need not analyze this claim in any detail as it must fail for the same reason as his constitutionally-based claim: Ervin has not shown that trial counsel lacked a reasonable basis for failing to object, and we conclude the evidence did not prejudice him.

what he terms improper, pejorative, and prejudicial references in the prosecutor's closing argument, in addition to the reference already discussed above. We initially note that a "prosecutor's remarks fall within the ambit of fair comment if they are supported by evidence and they contain inferences which are reasonably derived from that evidence." ***Commonwealth v. Hardcastle,*** 519 Pa. 236, 254, 546 A.2d 1101, 1109 (1988). Further,

> [a] new trial is not mandated every time a prosecutor makes an intemperate or improper remark. To constitute reversible error, the language must be such that its unavoidable effect would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant, so that they could not weigh the evidence and render a true verdict.

Id.

¶12 Ervin first cites as objectionable the prosecutor's commentary on defense counsel's closing arguments. In his closing, defense counsel noted that it was a "daunting task" to defend a defendant accused by "two small, cute, normal little girls for all appearances" of such "unspeakable" charges. (N.T. Trial, 12/13/95, at 2-3.) In his closing, the prosecutor made light of this reference by commenting:

> He told you that he had a daunting task before you, ladies and gentlemen, and I would agree with that, because it is a very daunting task when a person is attempting to cover up the truth.
>
> [Objection by counsel overruled by court.]

> Thank you Your Honor. It is a daunting, very daunting task when a defense has to be presented that covers up the truth. He made a comment that the adults may want to protect children, and it is your feeling to protect children. I will take it a step further. It's your obligation to protect children . . . that are victimized in a way such as this.

(N.T. Trial, 12/13/95, at 24-25.) We find such commentary to be well within the province of the prosecutor to comment on the evidence and respond to arguments made defense counsel

¶ 13 Next, Ervin refers to several additional portions of the prosecutor's closing argument, which he asserts were also inappropriate:

> Holly Ervin [Ervin's wife] testified. If you disbelieve one word she said, you can disregard the whole testimony. Let's build the defense, let's take a walk in the park, let's do what we can, build a defense, let's build an excuse, let's build an alibi, three days before the trial we are still at it. . . . But interestingly enough, last Thursday upon the request of her attorney, both her and [Ervin] walked up to the pond. Now all of a sudden it's taking all this time. Ladies and Gentlemen, think of the motives that I addressed to you in my opening, the reasons to lie. She has been living with this man throughout, she hasn't believed this throughout. Why?

(N.T. Trial, 12/13/95, at 29-30.)

> Remember the conversation [Ervin] had with the police? Do you remember when the police testified he said he was home from work at 5:00. Holly Ervin now says 3:00. He said he went to

> High Point swimming pool. He didn't go to High Point swimming pool. He said he went for a walk to the pond, it took ten minutes. We now know that they are saying something different. This little interview took place on the 3rd of July before the defense attorney was making requests of them, before they got together, before Holly talked about it with him extensively, before they talked about it with their attorney extensively. This is what he told us in the very beginning, and we know now each and every one of those statements are lies.

(*Id.* at 32-33.)

> It took great courage for [A.T. and M.T.] to come up here, it took great courage for [A.T.] to get up here and tell you what happened, took great courage for [M.T.] to follow this through, for [A.T.] to follow this through, and, ladies and gentlemen, it's going to take courage for you. Please see their courage through, please see their courage through, and if you do, if you make their courage count, if you let the community know that this will not be tolerated, not in our community, not anywhere I am, if you let this courage count, then you will find the defendant guilty of all charges. Thank you.

(*Id.* at 41.) We agree with the PCRA Court that these comments were permissible when examined in the context of the entire trial. As we find that the prosecutor's argument was not objectionable, we must conclude that Ervin's assertion of counsel's ineffectiveness for failing to object lacks arguable merit and, therefore, we reject this claim.

¶14 Ervin finally contends that trial counsel was ineffective for not calling character witnesses at trial. This claim was dismissed on direct appeal because appellate counsel failed to offer sufficient proof regarding the substance or import of this testimony, *see Ervin*, 691 A.2d at 971, and, therefore, Ervin additionally asserts appellate counsel's ineffectiveness on this point.

¶15 In order to establish a claim for ineffective assistance of counsel based on the failure to call a witness or witnesses, a defendant must establish that: (1) the witness existed; (2) the witness was available to testify; (3) counsel was informed of the existence of the witness or where counsel should otherwise have known of him; (4) the witness was prepared to cooperate and testify for defendant at trial; and (5) the absence of the testimony prejudiced defendant so as to deny him a fair trial. *See Commonwealth v. Lilliock*, 740 A.2d 237, 245 (Pa. Super. 1999).

¶16 Ervin attached to his PCRA petition the affidavits of five witnesses which stated that they were ready and willing to testify to his good character. We accept, for purposes of this analysis, that Ervin's claim has arguable merit. However, we nonetheless find that Ervin's claim fails because we agree with the PCRA court that trial counsel had a reasonable basis for failing to call the witnesses.

¶17 At the PCRA hearing, trial counsel testified that he had two reasons for not calling the character witnesses. First, some of the witnesses were associated with the Boy Scouts or children's sporting events, and he considered that they would be inappropriate witnesses in light of the

charges against Ervin. (N.T. PCRA Hearing, 3/19/99, at 16-17.) We find this rationale to be reasonable.

¶18 Second, trial counsel stated that he was concerned that character evidence would open the door to testimony about Ervin's arrest for allegedly raping his sister in the mid-1980s. (*Id.* at 12-23.) At the hearing, trial counsel conceded his misapprehension of the law on this second point – that, in fact, the Supreme Court in *Commonwealth v. Scott*, 496 Pa. 188, 436 A.2d 607 (1981), held that it is unfairly prejudicial to cross-examine character witnesses about their knowledge of an arrest which has not led to conviction. Nonetheless, counsel's concern about references to Ervin's past misconduct was not unreasonable as cross-examination concerning this misconduct could have come in – at least at the time of his trial – to test the standard by which the witness measured Ervin's reputation.[15] *See Commonwealth v. Peterkin*, 538 Pa. 455, 467-68, 649 A.2d 121, 127 (1994) (holding that "trial counsel's concern for damaging cross-examination was a reasonable basis not to pursue character or background witnesses because the witnesses would have been susceptible to cross-examination regarding the appellant's particular acts of misconduct" which did not involve arrest).

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[15] Not until the Supreme Court's recent decision in *Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033 (1999), was it clear that all such cross-examination was impermissible. *Id.* at 255, 739 A.2d at 1037 ("[W]e find that the trial court abused its discretion in ruling that the Commonwealth was entitled to cross-examine Appellant's proposed character witnesses about their knowledge of allegations in the community that Appellant had previously committed offenses similar to the ones at issue.").

Further, trial counsel testified that he would have made the same decision even if he had been aware of the *Scott* decision. (N.T. PCRA Hearing, 3/19/99, at 21-22.) Therefore, for all these reasons, we find that trial counsel had a reasonable basis for failing to call the character witnesses and, therefore, we must reject Ervin's claim.

¶19 Having rejected each of Ervin's ineffectiveness claims, we affirm the order of the PCRA Court.

¶20 Order affirmed.

Judgment Entered.

/s/ [Illegible]
Prothonotary

Date: DEC 29 2000

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. PAUL LEROY ERVIN, Petitioner	:	No. 270 MAL 2001 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

AND NOW, this 4th day of January, 2001, the Petition for Allowance of Appeal is hereby **DENIED**.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF
BUCKS COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	NO. 4981-95 4982-95
vs.	:	
PAUL LEROY ERVIN	:	

OPINION

Defendant, Paul Leroy Ervin, was convicted by a jury before the undersigned of three (3) counts of rape; four (4) counts of involuntary deviate sexual intercourse; five (5) counts of aggravated indecent assault; nine (9) counts of indecent assault; two (2) counts each of endangering welfare of children and corruption of minors; and one (1) count each of incest, indecent exposure, statutory sexual assault and sexual assault on two separate informations which were consolidated for trial. Defendant was subsequently sentenced on information number 4981/95 to incarceration at a state correctional facility for not less than seven (7) nor more than fifteen (15) years, followed by a sentence of five (5) years probation on information number 4982/95.

Following this timely direct appeal, defendant, pursuant to Pa.R.A.P. §1925(b), now complains that trial counsel was ineffective by:

(1) not adequately investigating the circumstances surrounding defendant's arrest;

(2) not calling character witnesses to testify; and (3) not calling expert witnesses to testify.

An evidentiary hearing was held on June 7, 1996 to supplement the record on the aforementioned issues. At the evidentiary hearing, appellant's counsel claimed no additional allegations of ineffectiveness of trial counsel. (N.T. 6/7/96, 3).

FACTS

The victims, M.T. and A.T., are defendant's daughters. Both M.T. and A.T. reside with their mother, Rebecca McCardell. Defendant, who never married to Ms. McCardell, was the father of four of her children. (N.T. 12/12/95, 139). Pursuant to visitation arrangements between Ms. McCardell and the defendant, M.T. and A.T. were visiting defendant at his home at the time of the incidents. (N.T. 12/12/95, 142). Before removal by the New Britain Township Police Department on July 1, 1995, the children were scheduled to remain with defendant at 209 Wiltshire Drive, Chalfont, Bucks County, the last week of June through the first week of July, 1995.

(N.T. 12/12/95, 142, 160).

M.T., eleven (11) years old, and A.T., ten (10) years old, both testified for the Commonwealth. On July 1, 1995, M.T. was playing with a computer in the defendant's house. While playing, M.T. was seated upon defendant's lap. (N.T. 12/12/95, 31). Defendant's wife, Holly Ervin, was not present in the household at that time. Defendant asked M.T. to go to the basement. (N.T. 12/12/95, 33). After going to the bathroom and then

retrieving two (2) bottles of beer for defendant, M.T. went downstairs. Shortly thereafter, defendant met M.T. downstairs. M.T. hugged the defendant who then stood M.T. upon a chair. (N.T. 12/12/95, 37). The defendant then proceeded to remove M.T.'s shorts and underwear and with his fingers, touched M.T. around the "crack" of her "private". (N.T. 12/12/95, 37-40). M.T. was told to remain silent about the incident and was threatened with a wooden paddle should she reveal the occurrence. (N.T. 12/12/95, 41).

A.T. testified to the two (2) incidents in which she was involved. Said incidents occurred on July 1, 1995, on the same day that defendant was involved with M.T. The first incident took place in the computer room. A.T. was seated at the computer when defendant entered the room, told A.T. to move, and sat on the computer chair with A.T. on his lap. (N.T. 12/20/95, 70). A.T., who was wearing a short outfit, testified in part as follows:

Q. Okay. Now, when you were sitting on his lap, what, if anything, did he do?

A. (No response.)

Q. Can you tell us?

A. (No response.)

Q. (Can you tell us what he did?)

A. He was sticking his finger in my private.

Q. And after he stuck his finger in your private, what would he do with his finger, if anything?

A. He was moving it around.

Q. In your private?

A. Yes.

Q. And did he pull your pants down? Tell me how he did it.

A. Well, he just – he would stick it through my shorts – through my shorts and through my underwear.

. . . .

Q. Now, you said that he was moving his fingers around in there?

A. Yes.

Q. Was he moving them around in the crack or outside the crack?

A. Inside.

Q. Inside. After he touched you in your privates, what did he do with his fingers, if anything?

A. Well, he would lick them and then put them back in.

Q. I didn't hear.

A. He would like lick his fingers and then put them back in.

Q. He would lick his fingers and put them back in?

A. Yes.

Q. In your private?

A. Yeah.

Q. Was there anyone else in the computer room when he did this?

A. No.

(N.T. 12/12/95, 71-73).

That same day, following the incident in the computer room, the defendant took A.T. for a walk to a pond situated near the house. (Exh. C-6, 7). Defendant would not permit his other children to join them. (N.T. 12/12/95, 76). Defendant escorted A.T. to a wooded area surrounding the pond. (N.T. 12/12/95, 70-80). Defendant proceeded to remove A.T.s' pants and underwear completely while lowering his own to his ankles. (N.T. 12/12/95, 83).

A.T. further described the incident:

Q. You were laying on your back. And were you looking at your dad when you were laying on your back?

A. No.

Q. What were you doing?

A. I was just looking up at the sky.

Q. Looking up at the sky. Where was he at when you were laying down; was he standing still?

A. I'm not sure.

Q. Okay. After a while, while you were laying there, what did he do.

A. He stuck his private into mine.

Q. He stuck his private in yours?

A. Yes.

Q. Now, when he stuck his private in yours, was he still standing or was he doing something else.

A. He was like down on his hands and knees.

Q. And were you still on your back?

A. Yeah.

. . . .

Q. Now, you circled a private on this picture. Is this the private you are talking about that it went in?

A. Yes.

Q. Did it go in a whole lot, or was it just a little bit; if you know?

A. Just a little bit.

Q. Was that the only place that he put his private?

A. No.

Q. Where else did he put it?

A. He put it in my rear end.

(N.T. 12/12/95, 84, 87).

During the incident, A.T., who was crying, was told to be quiet and had her mouth forcibly covered by defendant. (N.T. 12/12/95, 88, 89). She was told not to reveal the occurrence and was threatened with a spanking from a wooden paddle or removal from her mother's custody. (N.T. 12/12/95, 47, 88, 89).

Later that night, A.T. told her sister, M.T., what occurred at the pond area. (N.T. 12/12/95, 47, 91). On Saturday, July 1, 1995, M.T. returned a phone call from her mother, Rebecca McCardell. Ms. McCardell, sensing that M.T. was upset, inquired. After some coaxing, M.T. conveyed what occurred between defendant, A.T. and herself. (N.T. 12/12/95, 144). Ms. McCardell, upon reassuring M.T., departed for Bucks County, arriving at the New Britain Township Police Station late on July 1, 1995. Based upon the information that Ms. McCardell supplied,

Officer Glen Golembeski was dispatched at 1:00 a.m. on July 2, 1995, to defendant's address at 209 Wiltshire Drive, whereupon he removed the children from the defendant's custody.

The following night, July 3, 1995, the defendant was served with a search warrant. The defendant cooperated with the warrant and submitted blood, head and pubic hair samples. Three (3) pairs of blue-jeans and three (3) pairs of his underwear were also confiscated from defendant's bedroom. (N.T. 12/12/95, 179). Said samples and evidence were analyzed by the Pennsylvania State Police Laboratory, along with A.T.'s underwear, blood and saliva samples, vaginal and anal swabs and pubic combings. As per stipulations between counsel, it was agreed that the human blood on A.T.'s underwear was determined to be her own. Other tests revealed "nothing of evidentiary value found by the Pennsylvania State Police." (N.T. 12/12/95, 201, 202).

The defendant's theory of the case "was that [M.T.] had fabricated . . . the incident . . . because she felt very strongly about not being an Ervin, about not coming to visit Paul Ervin." (N.T. 6/7/96, 31, 95). Defense counsel elicited such testimony from Becky McCardell, Helen Haun, and Holly Ervin, defendant's wife. Said testimony was consistent with defendant's theory of defense.

Rebecca McCardell testified that her daughter, M.T., did not enjoy visiting defendant, however, because of the custodial arrangement, M.T. acquiesced. (N.T. 12/13/95, 213). Holly Ervin also testified that M.T. said she desired to be a "McCardell" and not an "Ervin" and that M.T. and she had discussed the issue. (N.T. 12/13/95, 236).

DISCUSSION

The only issues raised in this direct appeal are those of ineffective assistance of trial counsel.

Upon review of the ineffective assistance claims, it must be determined whether the underlying issues forming the basis of such claims are of arguable merit, and if so, whether the action taken by counsel had some reasonable basis that was designed to serve the interests of the client. *Commonwealth v. Buehl,* 510 Pa. 363, 508 A.2d 1167, 1174 (1986). Additionally, defendant must show how the ineffectiveness worked to his prejudice. *Commonwealth v. Pierce,* 515 Pa. 153, 527 A.2d 973, 976 (1987). In order to establish prejudice, a showing must be made that counsel's errors were so serious that they deprived the defendant of a fair trial. *Commonwealth v. Carter,* 409 Pa.Super. 184, 597 A.2d 1156 (1991). A review of the record does not demonstrate that defendant's allegations of ineffective assistance of counsel have merit or that defendant was rendered unreasonable or prejudicial assistance.

Trial counsel, Michael Goodwin, possesses vast experience in the practice of law, and criminal law in particular. Mr. Goodwin, a former prosecutor, has practiced law for sixteen (16) years, twelve (12) of them as a criminal defense attorney. (N.T. 6/7/96, 5, 76). His preparation for the defense included reading the complete file three (3) times; discussing the case "a couple dozen times" *with* defendant and his family; interviewing all potential witnesses and conducting site inspections. (N.T. 6/7/96, 98-100). At no time did defendant or his family express disagreement or discontent with trial counsel's strategy or representation. (N.T. 6/7/96, 100).

Defendant's allegation that counsel was ineffective because he did not "adequately investigate the circumstances" surrounding the arrest must fail. Trial counsel interviewed eleven (11) potential witnesses. (N.T. 6/7/96, 7, 8). These included the defendant, his wife, Holly Ervin; the mother and father-in-law of defendant, Helen and Gustavo Haun; the three (3) children of Holly Ervin; and various other witnesses. As counsel pursued interviews with all possible witnesses, defendant's contention is without arguable merit. (N.T. 6/7/96, 7, 8). In addition, the pond area where A.T. was raped was personally inspected by counsel as was defendant's home. (N.T. 6/7/96, 33, 77). While Goodwin conceded that he did not take photographs of the pond area where the rape occurred, the "[t]aking of pictures wouldn't make it any more or less likely that [M.T.] would have dirty clothes." (N.T. 6/7/96, 34). Furthermore, a challenge to the search warrants was not pursued by counsel in that "the evidence obtained . . . was helpful to the defense." (N.T. 6/7/96, 12). Further investigation into the merits of the warrants was not necessary as a stipulation between the parties essentially stated that none of the physical evidence obtained from the defendant's person or possessions "connected the defendant to this incident." (N.T. 6/7/96, 13). Finally, counsel, based upon his investigation of the case and discussions with his client and the defendant's witnesses developed the defense theory that M.T. fabricated the incidents so as to avoid visiting her father and because M.T. did not want to remain an Ervin. *See Supra.* As such, the various actions taken by counsel had a valid, reasonable basis that were designed to serve the interests of his client.

Defendant next claims that counsel was ineffective because he did not call character witnesses for defendant. However, Mr. Goodwin's strategy not to call character witnesses was predicated upon a reasonable basis that served the interests of defendant. Specifically, Mr. Goodwin declined to call character witnesses because of possible cross-examination of such witnesses regarding defendant's alleged rape of his sister in 1985. (N.T. 6/7/96, 35, 58). Mr. Goodwin reasoned that "putting on character evidence would permit the Commonwealth to cross-examine each character witness as to their knowledge of, had he been arrested for rape of his sister in the past." (N.T. 6/7/96, 36). Additionally, Mr. Goodwin declined to call character witnesses from various childrens' organizations that defendant was involved with as he thought it to "be a bad idea, simply because I didn't want members of the jury thinking he's [defendant] putting himself in a position to be near children for some other purpose." (N.T. 6/7/96, 36). As such, it was reasonable not to introduce evidence of the defendant's character. It cannot be determined that of the strategic alternatives available to counsel, the strategy utilized was so unreasonable that no competent counsel would have chosen it. *Commonwealth v. Miller,* 494 Pa. 229, 431 A.2d 233 (1981); *Commonwealth v. Jones,* 431 Pa. Super. 475, 636 A.2d 1184 (1994).

Defendant's final claim of alleged ineffectiveness for failing to call expert witnesses also must fail. Even assuming that the claim is of arguable merit, counsel possessed a reasonable basis for not introducing such testimony.

At trial, the Commonwealth presented testimony from Dr. David G. Marx. Dr. Marx was the emergency room physician who examined A.T. and M.T. on July 2, 1995. During cross-examination by Mr. Goodwin, Dr. Marx conceded that although he believed a fissure existed in the vaginal area of A.T., and that her hymen was "abnormally shaped," photographs of the area did not show such injuries. (N.T. 12/12/95, 122, 135); (Exhibits D-3, 4, 5).

Further expert medical testimony was not proffered by Mr. Goodwin as he believed Dr. Marx's testimony to be largely "neutral." (N.T. 6/7/96, 17, 24). Because the photographs of A.T.'s vaginal area were inconclusive and Dr. Marx's "testimony allowed the jury to conclude that the injury to [A.T.] was consistent with some other trauma," additional expert testimony was deemed unnecessary. (N.T. 6/7/96, 17, 19).

This case rested on the credibility of the witnesses. As such, trial counsel ably and amply advanced defendant's theory that the children fabricated the allegations of sexual abuse by their father because they did not want to visit him or to bear his name. No actions of trial counsel prevented defendant from pursuing this theory. This Court can only conclude that a reasonable basis existed for counsel's tactics and that no prejudice resulted from counsel's commission nor omission. *Commonwealth v. Pierre*, 515 Pa. 153, 527 A.2d 973 (1987).

BY THE COURT:

/s/ Cynthia M. Weaver, J.
CYNTHIA M. WEAVER, J.

Dated: 7-30-96

Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

No. 01-1449

IN THE

Supreme Court of the United States

PAUL LEROY ERVIN,

Petitioner,

v.

STATE OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA, HARRISBURG

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Procedural History

Petitioner was arrested on July 5, 1995 and charged with two counts of Rape,[1] two counts of Sexual Assault,[2] four counts of Involuntary Deviate Sexual Intercourse,[3] two counts of Aggravated Indecent Assault,[4] six counts of Indecent Assault,[5] two counts of Endangering the Welfare of Children,[6] two counts of Corruption of Minors,[7] and one count of Incest,[8] Indecent Exposure,[9] and Statutory Sexual Assault.[10] The victims in this case are Petitioner's two natural daughters, ages ten (10) and eleven (11).

The case was tried before a jury, with the Honorable Cynthia M. Rufe of the Bucks County Court of Common Pleas presiding. At trial, Michael Goodwin, Esquire represented Petitioner. The trial commenced on December 11, 1995,

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1. 18 Pa. Cons. Stat. Ann. §§ 3121(a)(1), (2)

2. 18 Pa. Cons. Stat. Ann. § 3124.1

3. 18 Pa. Cons. Stat. Ann. §§ 3123(a)(1), (2), (6), (7)

4. 18 Pa. Cons. Stat. Ann. §§ 3125(7), (8)

5. 18 Pa. Cons. Stat. Ann. §§ 3126(a)(2), (7), (8)

6. 18 Pa. Cons. Stat. Ann. § 4304(a)

7. 18 Pa. Cons. Stat. Ann. § 6301(a)(1)

8. 18 Pa. Cons. Stat. Ann. § 4302

9. 18 Pa. Cons. Stat. Ann. § 3127(a)

10. 18 Pa. Cons. Stat. Ann. § 3122.1

and Petitioner was convicted of all charges on December 13, 1995. During post-trial matters, John Brendan Elbert, Esquire, represented Petitioner. A sentencing hearing was held on March 4, 1996, where Judge Rufe sentenced Petitioner to not less than seven and one-half (7 ½) nor more than fifteen (15) years to be served at a state correctional facility. On June 7, 1996, a hearing was held on allegations of ineffective assistance of counsel. Petitioner then filed a brief in Superior Court. The Superior Court affirmed the judgment of the lower court and determined that all issues raised by Petitioner were without merit. The Supreme Court denied a petition for allocatur.

Petitioner then retained the services of S. Lee Ruslander II, Esquire. Petitioner filed a Post-Conviction Relief Act (PCRA) petition, and an evidentiary hearing was conducted on March 19, 1999. On August 31, 1999, the Honorable Cynthia M. Rufe, denied and dismissed Petitioner's PCRA petition. Petitioner appealed that decision, and on November 1, 2000, the Superior Court affirmed the order of the PCRA court. Petitioner then filed an application for reargument, and on December 29, 2000, the Superior Court again affirmed the order of the PCRA court. Petitioner filed a second application for reargument, and the Superior Court once again affirmed the order of the PCRA court. Petitioner filed a petition for allocatur, which the Pennsylvania Supreme Court denied. This Petition for Writ of Certiorari followed.

B. Factual History

The victims in this case, M.T. and A.T., are Petitioner's daughters. At the time of the events in this case, M.T. was eleven (11) years of age, and A.T. was ten (10) years of age. Both M.T. and A.T. resided with their mother, Rebecca McCardell, in Chambersburg, Pennsylvania. In 1995, the year in which Petitioner committed these crimes, Ms. McCardell

and Petitioner had a visitation agreement that had been in existence for several years. Petitioner had remarried, however, and his visitation with his two daughters had steadily decreased over a period of four years. (N.T. 12/12/95, pp. 140-141). At the time of these events, the victims were visiting Petitioner at his residence in Bucks County. (N.T. 12/12/95, p. 142). The agreement was for the children to remain with Petitioner for a two-week period, which included the last week of June 1995 and the first week of July 1995. (N.T. 12/12/95, p. 142). This was the first time that the children had visited Petitioner that year.

The first incident occurred with Petitioner's ten-year-old daughter, M.T. On July 1, 1995, just before dinnertime, M.T. entered the computer room in Petitioner's residence to play with the puppies. (N.T. 12/12/95, p. 30). M.T. also wanted to play with the computer. Petitioner was using the computer at the time and agreed to let M.T. use it. M.T. then sat on Petitioner's lap to play on the computer. (N.T. 12/12/95, p. 32). M.T. and Petitioner were alone in the computer room, and Petitioner's wife, Holly, had not yet returned from work. The other children then entered the computer room and began playing on the computer. Petitioner asked M.T. to go downstairs to the basement with him. (N.T. 12/12/95, p. 32). M.T. knew that Petitioner had been drinking alcoholic beverages that day. (N.T. 12/12/95, p. 33).

M.T. went to the bathroom and then went downstairs. Shortly thereafter, Petitioner followed her to the basement. He went over to M.T., lifted her up, and placed her in a standing position on a chair. (N.T. 12/12/95, pp. 35-36). Petitioner pulled down M.T.'s pants and began to touch her vagina with his finger. The touching continued for a few minutes. (N.T. 12/12/95, pp. 37-40). Petitioner stopped when he realized his wife had returned from work. He told M.T. not to tell anyone or she would get smacked with a wooden paddle. (N.T. 12/12/95, p. 42).

The second and third incidents occurred with Petitioner's daughter A.T., who was ten (10) years of age at the time of these events. On July 1, 1995, shortly after the incident with M.T., A.T. was in the computer room playing on the computer. Petitioner entered the computer room and ordered her to move. (N.T. 12/12/95, p. 70). Petitioner sat down at the computer, and A.T. then sat on his lap. A.T. was wearing shorts and a top. Petitioner proceeded to stick his finger in A.T.'s vagina. (N.T. 12/12/95, pp. 70-71). Petitioner moved his fingers around inside the crack of A.T.'s vagina. As Petitioner did this, he would remove his fingers and lick them. He would then put his fingers back into A.T.'s vagina. (N.T. 12/12/95, p. 73). Petitioner was alone with A.T. in the computer room as this happened. A.T. began to cry in the computer room as Petitioner was touching her and licking his fingers. Petitioner covered A.T.'s mouth and told her to be quiet. (N.T. 12/12/95, p. 74). A.T. specifically recalled that Petitioner was drinking bottled beer that night. (N.T. 12/12/95, p. 77).

The third incident occurred later that same day, before dinner. Petitioner took A.T. for a walk to the pond located near his residence. Petitioner's other daughter, M.T., from his present marriage, asked to go along, but Petitioner refused to let her. (N.T. 12/12/95, p. 76). Petitioner took A.T. to a wooded area surrounding the pond. At that point, Petitioner removed A.T.'s pants and underwear and lowered his own pants and underwear to his ankles. (N.T. 12/12/95, p. 83).

While A.T. was lying down on the ground with her pants and underwear removed, Petitioner penetrated her vagina with his penis. He was on his hands and knees while doing this (N.T. 12/12/95, p. 84). Petitioner also put his penis in A.T.'s anus. He muffled A.T.'s cries by placing his hands over A.T.'s mouth, and told her to be quiet. (N.T. 12/12/95, pp. 87-89). A.T., like M.T., was told not to tell what had happened or she would be spanked with a wooden paddle, and would also never see her mother again. (N.T. 12/12/95, p. 89).

Later that day, when Petitioner and A.T. returned from the pond, M.T. noticed that A.T.'s eyes were bloodshot red. (N.T. 12/12/95, p. 46). M.T. asked A.T. what was wrong in front of Petitioner. A.T. responded that they had gotten lost. Later that night, as the two were preparing for bed, M.T. asked A.T., "What really happened?" (N.T. 12/12/95, pp. 46-47). A.T. told her that, "Dad took her down halfway around the pond . . . and that he told her to pull down her pants . . . and he told her to do it or else she would never see mom again." (N.T. 12/12/95, p. 47). When Petitioner left the house, M.T. called her mother and told her what had happened to her sister and herself. (N.T. 12/12/95, pp. 48-49). Ms. McCardell immediately made phone calls to the State Police and Children and Youth Services. She traveled to Bucks County and with the help of the police, retrieved her children from Petitioner's residence. (N.T. 12/12/95, p. 147). In the early hours of July 2, 1995, New Britain Township Police removed the children from Petitioner's home and returned them to Ms. McCardell. (N.T. 12/12/95, pp. 160, 162).

REASONS FOR DENYING THE WRIT

I.

PETITIONER HAS SHOWN NO GROUNDS FOR WHICH THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER.

United States Supreme Court Rule 10 sets forth the considerations governing the Review on Certiorari as follows:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reason the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important question in a way that conflicts with relevant decisions of this Court.
>
> A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

United States Supreme Court Rule 10.

This is not a case where Petitioner is appealing an order of a United States court of appeals that entered a decision in conflict with the decision of another United States court of appeals on the same important matter. This is not a case where a United States court of appeals decided an important federal question in a way that conflicts with a decision by the Pennsylvania Supreme Court. This is also not a case where a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, so as to necessitate this Court's supervision. Further, this is not a case where the Pennsylvania Supreme Court or Pennsylvania Superior Court has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. This is not a case where a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. Finally, this is not a case where a state court or a United States court of appeals has decided an important question in a way that conflicts with relevant decisions of this Court. Moreover, there is no compelling reason for this Court to grant this Petition for Writ of Certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

II.

THE PENNSYLVANIA SUPERIOR COURT PROPERLY INTERPRETED THE STATE OF PERTINENT PENNSYLVANIA LAW, WHICH IS IN ACCORD WITH FEDERAL LAW, REGARDING THE ADMISSION OF PRE-ARREST SILENCE AGAINST A NONTESTIFYING DEFENDANT.

Petitioner was not in custody and not being questioned when he said nothing while the police removed his children from the residence. Under Pennsylvania law, a criminal defendant's silence will be deemed inadmissible if the defendant is in custody or if the police have initiated a custodial interrogation. *Commonwealth v. Gwynn*, 723 A.2d 143, 150 (Pa. 1998); *see Commonwealth v. Drass*, 718 A.2d 816, 819 (Pa. Super. 1998). This rule, however, does not apply to pre-arrest situations.

The Pennsylvania Superior Court stated in *Commonwealth v. Kitchen*, 730 A.2d 513, 524 (Pa. Super. 1999) that:

> a criminal defendant's right against self-incrimination is violated . . . when the comments or questions, followed by a lack of response from an accused, flow from a law enforcement officer during an interrogation of an accused. If an individual makes an accusatory statement to a person and that person fails to challenge or contradict the statement, evidence of the failure to respond may be admitted at trial. Our Court stated in *Commonwealth v. O'Kicki*, (citation omitted) 597 A.2d 152 (Pa. Super. 1991), the rule of evidence is well established that, when a statement made in the presence and hearing of a person if incriminating in character and naturally calls for denial but is not challenged or contradicted by the accused although he has the opportunity to

> speak, the statement and the fact of his failure to deny it are admissible in evidence as an implied admission of the truth of the charges thus made. The justification of this rule is to be sought in the age-long experience of mankind that ordinarily an innocent person will spontaneously repel false accusations against him, and that a failure to do so is therefore some indication of guilt.

The prosecution introduced during the direct examination of Police Officers Golembeski and Burkhardt that Petitioner made no comment on July 2, 1995 when police arrived and informed him of their plan to remove the children from his home. Additionally, the prosecution made argument regarding Petitioner's lack of reaction during closing. The introduction of this evidence and subsequent argument thereof reveals that such evidence was non-testimonial. The prosecution presented no evidence that the police officers questioned Petitioner on the night of July 2, 1995. In addition, the prosecution presented no evidence that an investigation surrounding Petitioner's conduct had commenced at the time the police arrived at Petitioner's house to remove the children. Rather, the police officers testified that they arrived at Petitioner's home for the sole purpose of removing the children.

It is clear that Petitioner was not in police custody in the early morning hours of July 2, 1995. Petitioner's wife let the police into the home. The officers' only purpose in being in the home was to ensure the safety of the children in leaving the premises. While in the home, one officer stated several times that his sole intent was to protect the safety and welfare of the children. (N.T. 12/12/95, pp. 163-165). The police officers entered Petitioner's bedroom and told Petitioner to "proceed downstairs and wait with Officer Burkhardt." (N.T. 12/12/95, p. 205). Officer Golembeski's presence in the bedroom was to "make sure [Ervin] was not going to arm himself or jump out a window." (N.T. 12/12/95 p. 204).

Petitioner was never handcuffed. The police never suggested to Petitioner that he was not free to go about his business. The officers made no request of Petitioner to exit the home. The officers made no request of Petitioner to answer questions. The police never warned Petitioner that he would be placed under arrest. The Police did not place Petitioner under arrest either before or after Petitioner went downstairs. The police only requested Petitioner proceed downstairs for the safety of Petitioner and themselves. The officers then removed the children from the premises and explained their basis for doing so. (N.T. 12/12/95, p. 163). Under the totality of the circumstances, Petitioner was not in custody and the conduct the officers observed occurred before Petitioner's arrest.

There was no police interrogation. Petitioner fails to cite any specific questions or conduct by the police officers that would have been likely to evoke an admission. Petitioner was merely asked to go downstairs and remain with an officer. Petitioner was not asked questions once he went downstairs. As the PCRA court noted, under *Commonwealth v. Turner*, 454 A.2d 537 (Pa. 1982), had Petitioner been in custody, police questioning may have been different, Petitioner's Fifth Amendment rights would have been at risk, and analysis of this issue might have been different. (Trial Court Opinion, 12/30/99, p. 7 n.6).

In conclusion, Petitioner was not subject to custodial interrogation. Petitioner was not taken into police custody until days after the removal of the children. Therefore, any comment on his behavior that evening was non-testimonial. Such evidence, under *Kitchen*, is admissible in the prosecution's case-in-chief and closing argument. Should the evidence and argument be deemed testimonial, Petitioner still fails to show his Fifth Amendment rights were violated under Pennsylvania law.

The Pennsylvania Supreme Court has ruled that, "absent a pronouncement by the United States Supreme Court, decisions of the inferior federal courts are not binding upon Pennsylvania courts." *Weaver v. Pennsylvania Bd. of Probation and Parole*, 688 A.2d 766, 772 (Pa. 1997), citing *Lindner v. Mollan*, 677 A.2d 1194 n.1 (Pa. 1996). Even where a federal question is involved, the state court is not required to follow a federal court and can determine whether or not the federal court decision is persuasive. *Id.*, citing *Breckline v. Metropolitan Life Ins. Co.*, 178 A.2d 748, 751 (Pa. 1962).

Nonetheless, several courts of appeals have addressed the extent of the Fifth Amendment privilege relating to pre-arrest silence, some on which Petitioner relies. Courts of appeals decisions, however, are not binding on Pennsylvania state courts. Moreover, the cases on which Petitioner relies are not persuasive authority for purposes of this case because they involve factual scenarios that are distinguishable from the case at bar. For example, Petitioner urges the reasoning set forth in *Ouska v. Cahill-Masching*, 246 F.3d 1036 (7th Cir. 2001) and *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000). In *Ouska*, the prosecution elicited testimony from a detective during its case-in-chief. The testimony indicated that the defendant remained silent in response to the detective asking her questions regarding a murder investigation. There, the court decided that the defendant's Fifth Amendment rights were violated. *Id.* at 1049.

The court in *Combs v. Coyle*, 205 F.3d 269, 283, 286 (6th Cir. 2000), held similarly, but specified that the privilege is not limited to persons in custody or charged with a crime; it may also be asserted by a suspect who is questioned during the investigation of a crime. The court's holding focused on the fact that the defendant, upon questioning by police, "invoked his privilege against self-incrimination by telling the officer to talk to his lawyer, thus conveying his desire to remain silent." *Id.*

The instant case is distinguishable from *Ouska* and *Combs*. In each of those cases, the defendant's silence was in response to police questioning, asked as part of an investigation. Additionally, in *Combs*, the defendant had invoked his right to remain silent after police questioned him for investigation purposes. Here, the silence on which the prosecution commented was Petitioner's inaction to officers removing his children from the home. At no time did officers question Petitioner regarding the rapes. Also, Petitioner never expressed a desire to remain silent. In fact, the investigation had not yet begun. Therefore, the cases Petitioner relies on are not persuasive in this case.

Petitioner erroneously cites to *Griffin v. California*, 380 U.S. 609, 615 (1965) to advance his contention that the Fifth Amendment protects pre-arrest silence. That case did not deal with the issue of pre-arrest silence, but rather the right to remain silent during trial. In *Griffin*, this Court found that the trial court erred for instructing the jury on the issue of guilt by explaining that a defendant's failure during trial to explain or deny evidence introduced by the prosecution may indicate the truth of such evidence. Thus, the quote Petitioner refers to, namely that the Fifth Amendment forbids comment by the prosecution with regard to defendant's silence, was specific to the defendant's right to remain silent during trial by exercising his right not to testify. To illustrate Petitioner's misuse of *Griffin*, the court in *United States v. Thompson*, 82 F.3d 849, 856 (9th Cir. 1996) opined that, "*Griffin* does not necessarily apply in a pre-arrest, non-coercive situation." Thus, *Griffin* is not controlling in the case at bar.

The cases in which the courts of appeals have ruled that the Fifth Amendment protects such silence were based on the fact that the defendant was questioned by authorities and invoked the right to remain silent and speak to an attorney. Such was not the case here, thus there was no Fifth

Amendment violation. The factual circumstances surrounding Petitioner's case are more closely aligned with the courts of appeals that have held a defendant's pre-arrest, pre-Miranda silence is admissible in the prosecution's case-in-chief. Several recent courts of appeals have held that the Fifth Amendment is not violated when the government comments on a defendant's silence prior to his arrest. *See United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991); *United States v. Zanabria*, 74 F.3d 590 (5th Cir. 1996); and *United States v. Oplinger*, 150 F.3d 1061 (9th Cir. 1998).

For instance, in *Rivera*, the court held that "the government may comment on a defendant's silence if it occurred prior to the time he is arrested and given Miranda warnings." 944 F.2d at 1568. In *Zanabria*, the court held that the Fifth Amendment protects a defendant against compelled self-incrimination, not a defendant's silence before he is arrested, where the government did not induce the silence at issue. 74 F.3d at 593. Similarly, the court in *Oplinger* held that the "privilege against compulsory self-incrimination is irrelevant to a citizen's decision to remain silent when he is under no official compulsion to speak." 150 F.3d at 1066-67.

Further, the court in *Oplinger* determined how far the Fifth Amendment extended based on "whether petitioner was in a position to have his testimony compelled and then asserted his privilege, not simply whether he was silent." *Id.* at 1066, citing *Jenkins v. Anderson*, 447 U.S. 231, 241, 243-44 (1980) (Stevens, J., concurring). "A different view ignores the clear words of the Fifth Amendment." *Id.* Moreover, in *United States v. Giese*, 597 F.2d 1170 (9th Cir. 1979), the court held that "[n]either due process, fundamental fairness, nor any more explicit right contained in the Constitution is violated by the admission of the silence of a person, not in custody or under indictment, in the face of accusations of criminal behavior." *Id.* at 1197. Finally, the court in *United States v. Gecas*, 120 F.3d 1419, 1456 (11th Cir. 1997), determined that "the self-

incrimination clause was intended as a 'limitation on the investigative techniques of government, not as an individual right against the world.' "

Here, the facts contained in *Rivera, Zanabria*, and *Oplinger* are similar to Petitioner's case, therefore, those cases are persuasive authority concerning whether the Pennsylvania Superior Court ruled correctly. Likewise, the reasoning set forth in those cases and *Jenkins*, *Giese*, and *Gecas* support pertinent Pennsylvania law that makes a distinction between whether a defendant's silence was a product of government inducement or merely inaction by a defendant who is not under arrest, had not been mirandized, and who had not been asked questions by officials. Because Petitioner's case is analogous to facts in those cases, Petitioner's Fifth Amendment rights were not violated.

III.

THE PENNSYLVANIA SUPERIOR COURT APPLIED THE PROPER STANDARD IN DETERMINING COUNSEL WAS NOT INEFFECTIVE.

The Pennsylvania Superior Court employed Pennsylvania's well-settled test for ineffective assistance of counsel. This test entails three prongs. To establish ineffective assistance of counsel, Petitioner must first show that the underlying claim itself has arguable merit. Second, Petitioner must show counsel's choice lacked a reasonable basis designed to effectuate the client's best interests. Third, Petitioner must demonstrate that he was prejudiced by counsel's decision. *Commonwealth v. Pierce*, 527 A.2d 973, 976 (Pa. 1987).

Petitioner argues that the Pennsylvania Superior Court did not properly address his ineffectiveness claim because it did not apply the test established by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Pennsylvania's test is

virtually identical to this Court's *Strickland* test. Because state courts share responsibility for the application and enforcement of federal law, state courts may interpret federal law. *City of Chester v. Public Util. Comm'n*, 773 A.2d 1280, 1285 (Pa. 2001). The Pennsylvania Supreme Court in *Pierce* addressed the issue of whether Pennsylvania's standard for ineffective assistance of counsel is similar to that of *Strickland*. The court in *Pierce* held that "identical textual policy considerations logically lead [it] to hold that together they constitute an identical rule of law. . . ." *Pierce*, 527 A.2d at 976-77.

Specifically, *Pierce* identified that "Strickland's major thrust is directed at establishing the rule that ineffective assistance mandates relief only where it has been established by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 974, citing *Strickland*, 466 U.S. at 694. The *Pierce* court explained that "the commanding intent of *Strickland* is to burden the defendant with the task of proving actual prejudice" using a totality of the circumstances test. *Id.* at 975. The court then explained that *Strickland* "directs the review of the appellate court at the reliability of the verdict rather than at the quality of counsel's performance." *Id.*

The court in *Pierce* went on to say that Pennsylvania's Supreme Court cases "clearly indicate that ineffectiveness claims are measured by two components. First, counsel's performance is evaluated in light of its reasonableness if it is determined that the underlying claim is of arguable merit. Second, the defendant must demonstrate how the ineffectiveness prejudiced him." *Id.* These are the two components of which the *Strickland* test is comprised. Therefore, Petitioner's allegation that the Superior Court, in hearing Petitioner's PCRA petition, should have applied the *Strickland* test, and that its failure to do so conflicts with this Court's jurisprudence has no merit. To the contrary, *Pierce* shows Pennsylvania's test is identical to this Court's standard.

Here, the Pennsylvania Superior Court came to the proper conclusion that Petitioner did not prove that trial counsel had no reasonable basis for failing to object to references of Petitioner's pre-arrest silence during testimony and closing argument. The burden is on Petitioner to show that trial counsel was ineffective. *Commonwealth v. Donahue*, 630 A.2d 1238, 1250 (Pa.Super. 1993). The Superior Court of Pennsylvania has recognized that trial counsel will be presumed effective when analyzing a claim of ineffectiveness. Counsel will be deemed effective if the choices made at trial had a reasonable basis designed to serve the client's interest. The degree of reasonableness is immaterial. The existence of alternatives that may have been more reasonable in hindsight will not satisfy a claim of ineffectiveness. *Commonwealth ex rel. Washington v. Maroney*, 235 A.2d 349, 352-53 (Pa. 1967).

Here, Petitioner fails to plead and prove the first prong of the test. Petitioner's silence did not follow questioning by officers, it did not follow the arrest of Petitioner, and it was not in response to Miranda warnings. Petitioner's conduct was observed by officers upon removing Petitioner's daughters from the residence, prior to the commencement of an investigation, prior to Petitioner's arrest, and prior to Miranda warning being given. Accordingly, evidence of Petitioner's inaction constituted non-testimonial evidence that was admissible. There was no constitutional or evidentiary ground upon which trial counsel should have objected. This evidence was relevant and not an infringement upon Petitioner's Fifth Amendment rights. As such, Petitioner's counsel cannot be held ineffective for failing to object.

Should this Court find there is arguable merit to an ineffective assistance of counsel claim, Petitioner fails to plead and prove the second prong of the test. Under the facts of this case, Petitioner was not under custodial interrogation and was not under arrest on the night police removed his

children. This evidence was non-testimonial in nature and admissible under evidentiary and constitutional grounds. Thus, it cannot be said trial counsel lacked a reasonable basis not to object.

Further, at the PCRA hearing, Petitioner did not question trial counsel concerning why he chose not to object to the prosecutor's questioning and argument; therefore the court had no way of determining whether trial counsel may have had a reasonable basis for not objecting. In support thereof, the Superior Court reasoned that, "the state of the law was [not] clear and the prejudice [was not] obvious," thus, the court could not "conclude that counsel lacked any reasonable basis for failing to object." *Commonwealth v. Ervin*, 766 A.2d 859, 863 (Pa.Super. 2000). Thus, Petitioner failed to plead and prove ineffective assistance of counsel under the second prong of the test.

Should this Court find Petitioner meets the second prong, he still fails to meet his burden under the third prong. Pursuant to the PCRA, an ineffective assistance of counsel claim may warrant relief only where it "so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place." 42 Pa.C.S. § 9543(a)(2)(ii). Pursuant to *Commonwealth v. Kimball*, 724 A.2d 326 (Pa. 1999), "the prejudice standard applicable to ineffective assistance of counsel claims brought on direct appeal is substantively identical to the prejudice standard for ineffective assistance of counsel claims brought on collateral appeal pursuant to the PCRA." *Id.* at 311. In addition, Petitioner must prove with reasonable probability that the outcome of the trial would have been different. *Id.* at 331.

Petitioner has failed to plead and prove that the outcome of the trial would have been different. The Pennsylvania Superior Court properly concluded:

> We are convinced that in the context of the trial as a whole — the forceful testimony of the two girls, together with the medical expert testimony about the probable causes of the deformation of A.T.'s hymen — that Ervin would have been convicted without this evidence.

Ervin, 766 A.2d at 863. Thus, Petitioner also fails to meet his burden under the third prong.

Nevertheless, even if this Court finds counsel was ineffective, counsel's failure to object was harmless error. A new trial cannot be granted if the error was harmless. *Commonwealth v. Rivera*, 597 A.2d 690, 694 (Pa.Super. 1991). Evidence will be treated as harmless if any one of three grounds is met: (1) the error did not prejudice the defendant or the prejudice was de minimus; (2) the erroneously admitted evidence was cumulative of other, untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted evidence was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict. *Commonwealth v. Montgomery*, 687 A.2d 1131, 1138 (Pa. Super. 1996).

First, the error did not prejudice Petitioner and if prejudicial at all, was de minimus. As explained above, Petitioner would not be prejudiced by the error because there was more than sufficient evidence to convince the jury that Petitioner committed the rapes without the evidence regarding his behavior while officers removed his daughters from the home. Next, the prosecution introduced evidence

that was so overwhelming that the prejudicial effect of the error would be insignificant by comparison, such that the omission of counsel's objection could not have contributed to the jury's verdict of guilty.

CONCLUSION

Based on the reasons set forth herein and authorities stated in support thereof, the Commonwealth respectfully requests that this Honorable Court deny this Petition for a Writ of Certiorari.

Respectfully submitted,

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